

CONSTITUTIONAL LAW — FIRST AMENDMENT — NINTH CIRCUIT HOLDS MONTANA ELECTION CONTRIBUTION DISCLOSURE REQUIREMENTS UNCONSTITUTIONAL AS APPLIED TO DE MINIMIS CONTRIBUTIONS. — *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).

As political campaigns have become more expensive¹ and sophisticated,² Congress has increasingly regulated them,³ yet the Supreme Court has declared many aspects of that regulation unconstitutional.⁴ Recently, in *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*,⁵ the Ninth Circuit continued this deregulatory trend by holding that Montana's election contribution disclosure requirements were unconstitutional as applied to de minimis campaign expenditures.⁶ Though the bureaucratic disclosure requirements of the regulation at issue may chill speech, an effect that the court correctly recognized,⁷ another feature of the regulation may chill speech even more: its third-party enforcement mechanism. Because the regulation allows third parties to bring complaints of campaign rulebreaking,⁸ enforcement against minor parties may spring from questionable motives, result in disproportionate burdens, and ultimately militate against the public interest. Legislatures crafting campaign law and judges applying it should be cognizant of these difficulties.

In the spring of 2004, supporters of Constitutional Initiative No. 96 (CI-96), which would amend the Montana Constitution to define marriage as between one man and one woman, sought the signatures necessary to place the initiative on the November ballot.⁹ Wishing to help, the pastor of the Canyon Ferry Road Baptist Church, Berthold Gotlieb Stumberg III, held a Sunday evening service focused on the issue of marriage.¹⁰ To prepare for the service, Stumberg placed free

¹ See, e.g., Robert G. Boatright, *Campaign Finance in the 2008 Election*, in THE AMERICAN ELECTIONS OF 2008, at 137, 137 (Janet M. Box-Steffensmeier & Steven E. Schier eds., 2009); David B. Magleby, *Rolling in the Dough: The Continued Surge in Individual Contributions to Presidential Candidates and Party Committees*, 6 FORUM, Issue 1, art. 5, 2008, available at <http://www.bepress.com/forum/vol6/iss1/art5>.

² See, e.g., Shane D'Aprile, *Operation New Media: From Texting to Twitter, Obama's Tools and Consultants Are Shaping Overseas Campaigns*, CAMPAIGNS & ELECTIONS' POL., Apr. 2009, at 26, 27.

³ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

⁴ See *Davis v. FEC*, 128 S. Ct. 2759 (2008); *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

⁵ 556 F.3d 1021 (9th Cir. 2009).

⁶ *Id.* at 1028.

⁷ *Id.* at 1034.

⁸ See MONT. ADMIN. R. 44.10.307 (2009).

⁹ *Canyon Ferry Rd.*, 556 F.3d at 1024. The initiative passed 66.5% to 33.5%. *Id.* at 1025.

¹⁰ *Id.* at 1024-25.

public service announcements on radio stations encouraging attendance. He also allowed a member of his congregation to use her own paper and the church's copier to make copies of the CI-96 petition and place the copies in the church foyer.¹¹ At the Sunday evening event, the church aired a simulcast titled *The Battle for Marriage*,¹² after which Stumberg spoke briefly in support of marriage as between one man and one woman and encouraged attendees to sign the CI-96 petitions in the church's foyer.¹³ Over the next several weeks, ninety-two church members and six others signed the petition.¹⁴

One of the Sunday attendees was an employee of the Montana Human Rights Network¹⁵ charged with monitoring the event. His report of the evening service came to Robert Hill, the political leader of the opponents of CI-96.¹⁶ Hill filed a complaint against the church with Montana's Commission of Political Practices.¹⁷ After investigating, the Commission concluded that the church's activities made the church an incidental political committee,¹⁸ which required it to disclose certain donor information.¹⁹

The church sought declaratory relief and nominal damages from the Commission in Montana's federal district court.²⁰ The church argued that the compliance requirements chilled its speech; violated its rights of free speech, free exercise of religion, and freedom of associa-

¹¹ *Id.* at 1024.

¹² The broadcast featured several prominent Christian leaders voicing support for one-man, one-woman marriage and criticizing the Massachusetts Supreme Judicial Court's legalization of same-sex marriage. See Church Communication Network, *The Battle for Marriage*, http://www.ccn.tv/programming/event/evt_23may04.htm (last visited Jan. 9, 2010).

¹³ *Canyon Ferry Rd.*, 556 F.3d at 1024-25.

¹⁴ *Id.* at 1025, 1030.

¹⁵ The organization states: "*What We Believe*: We believe we must fearlessly confront racism, anti-Semitism, homophobia and other forms of injustice . . ." Montana Human Rights Network, <http://www.mhrn.org> (last visited Jan. 9, 2010).

¹⁶ Appellants' Opening Brief at 9-10, *Canyon Ferry Rd.*, 556 F.3d 1021 (9th Cir. 2009) (No. 06-35883), 2007 WL 1032525.

¹⁷ *Canyon Ferry Rd.*, 556 F.3d at 1025.

¹⁸ *Id.* Montana regulations define an incidental committee as "a political committee that is not specifically organized . . . [for] influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue." MONT. ADMIN. R. 44.10.327(2)(c) (2009). Regulation further stipulates that all such contributions, regardless of amount, be filed with the state. See *id.* R. 44.10.511, 44.10.513.

¹⁹ *Canyon Ferry Rd.*, 556 F.3d at 1025; see also Montanans for Families & Fairness v. Canyon Ferry Rd. Baptist Church, slip op. at 9-10 (Mont. Comm'r of Political Practices Mar. 3, 2006), available at <http://www.politicalpractices.mt.gov/content/pdf/2recentdecisions1-ethics/canyanferrycfpr.pdf>. The Commission requires incidental committees to disclose identifying information and the value of monetary and in-kind contributions. See Mont. Comm'r of Political Practices, Form C-4: Incidental Political Committee Finance Report (2008), available at <http://politicalpractices.mt.gov/content/5campaignfinance/filcompleteC4.pdf>.

²⁰ See *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Higgins*, No. CV 04-24-H-DWM, 2006 WL 6196415 (D. Mont. Sept. 26, 2006).